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IN THE

Supreme Court of the United States

October Term, 1971
No. 71-369

GUILFORD DINSMUIR SHAW,

Petitioner,

vs.

PETER PITCHESS, Sheriff of Los Angeles County,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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Opinions Below

The opinion of the District Court is reported at 324 F.Supp. 781. The opinion of the Court of Appeal for the Ninth Circuit (App. A of Petition) is reported at 440 F.2d 412.

Jurisdiction

The jurisdictional requisites are adequately set forth in the Petition.

Questions Presented

1. Was the felony complaint upon which petitioner was bound over for trial in the California Superior Court deficient under federal standards?

2. Is California Penal Code section 288a, which makes the act of oral copulation a crime, unconstitu-

tional as applied to two adult males who engage in such activity in an open toilet stall located in the public restroom of a restaurant?

3. Were petitioner's Fourth Amendment rights violated when a police officer observed the act of oral copulation through a false ventilator installed in the wall of the restroom?

4. Did the California and federal courts correctly hold that the admission of an extrajudicial statement of petitioner's codefendant was harmless beyond a reasonable doubt?

Statutes Involved

The pertinent sections of the California Penal Code are adequately set forth in Appendix C to the Petition.

Statement of the Case

This petition for a writ of certiorari is petitioner's second attempt to have this Court review his 1965 conviction for violation of California's oral copulation statute.

In 1965, a jury found petitioner guilty of the substantive offense, and he received a suspended sentence and two years' probation. Execution of the probation order was stayed pending direct appeal and habeas corpus proceedings in the lower federal courts. The conviction was affirmed by the California Court of Appeal in an unpublished opinion filed September 16, 1968. When the California Supreme Court denied a petition for hearing on November 13, 1968, this petitioner took an appeal to this Court. On May 26, 1969, this Court dismissed the appeal for want of jurisdiction and, treating the appeal papers as a petition for a writ of certio-

rari, denied certiorari as well. *Shaw v. California,* 395 U.S. 211, 23 L.Ed.2d 213, 89 S.Ct. 1772 (1969).

Thereafter this petitioner filed a petition for a writ of habeas corpus in the United States District Court for the Central District of California. After the district judge made an independent examination of the state court record, he concluded:

> "Since all questions raised here have been considered and decided by the [California] District Court of Appeal, and since we agree completely with that court's conclusions, we can do no better than to adopt, as our own, the District Court of Appeal's opinion in so far as it relates to the questions here raised." *Shaw v. Pitchess,* 324 F.Supp. 781 (C.D. Cal. 1969).

It should be noted that the district court's order was a summary dismissal in that neither a return nor any other informal response was requested from petitioner's custodian. The United States Court of Appeals for the Ninth Circuit agreed with the district court that the California court has adequately disposed of the issues raised in this case. Accordingly, the Ninth Circuit affirmed the order denying the petition for a writ of habeas corpus. *Shaw v. Pitchess,* 440 F.2d 412 (9th Cir. 1971).

Statement of Facts

This case involves various legal issues arising out of petitioner's conviction for participating in an act of oral copulation which took place in an open toilet stall within the public restroom of a restaurant. Richard Allen Huddleston, the manager of Coffee Dan's restaurant in Santa Monica, California, contacted the police

department of that city and complained about homosexuals using the restaurant's restroom as a meeting place. [Rep. Tr. p. 31.] At the suggestion of the police, Mr. Huddleston had the door to the toilet stall in the men's restroom removed, leaving the toilet enclosed on three sides only. A false ventilator aperture was placed in the wall of the restroom. This louvered opening permitted visual observation of the restroom from a refrigeration room on the other side of the wall. The police were given access to the refrigeration room to conduct a surveillance of persons frequenting the restroom [*See* Rep. Tr. pp. 32, 35-36, 93, 95, 98, 102, 104, 144, 183.]

On March 19, 1965, Officers Sutter and Sullivan of the Santa Monica Police Department were on duty in the refrigeration room of the restaurant. [Rep. Tr. pp. 93, 144, 183.] At about 11:55 p.m., Officer Sutter was looking through the false vent into the men's restroom and observed petitioner enter the restroom. Petitioner walked directly to the commode area, lowered his trousers, and sat on the toilet. [Rep. Tr. pp. 102, 104.] About five minutes later, codefendant Peralta entered the restroom and went to the urinal. While codefendant Peralta stood at the urinal, he kept looking over his left shoulder in the direction of petitioner who remained seated on the toilet. [Rep. Tr. pp. 104-105.] After about 20 seconds had elapsed, codefendant Peralta turned toward petitioner and began massaging his own penis. [Rep. Tr. p. 106.] Petitioner dropped his trousers to the floor and also began massaging his penis. [Rep. Tr. pp. 107, 108.] Appellant also made gestures with his tongue, sticking it out and drawing it back into his mouth. [Rep. Tr. p. 109.]

At this point another man entered the restroom. Codefendant Peralta placed his penis back in his trousers and moved to the wash basin. Petitioner stopped massaging his penis and remained on the commode. [Rep. Tr. p. 110.]

When this third man left the restroom, codefendant Peralta returned to the urinal. The two men resumed masturbating. [Rep. Tr. p. 216.] Petitioner made a third gesture with his tongue. Codefendant Peralta walked along the north wall of the restroom. Upon reaching petitioner, codefendant Peralta placed his hand behind petitioner's neck. Codefendant Peralta's penis entered petitioner's mouth, and petitioner orally copulated it. [Rep. Tr. pp. 111-113.]

After observing this activity for two to three seconds Officer Sutter and his partner went into the restroom. [Rep. Tr. pp. 113-114.] They found petitioner and codefendant Peralta by the commode. [Rep. Tr. p. 201.]

The two officers, one after the other, advised both petitioner and codefendant Peralta that they had the right to remain silent, that they had the right to an attorney at all stages of the proceedings, and that anything that they might say could be used against them in criminal proceedings.* [Rep. Tr. pp. 141, 144-145.] Both men indicated that they understood this advice. [Rep. Tr. p. 147.]

About fifteen minutes later, in the booking area of the Santa Monica jail [Rep. Tr. p. 148], petitioner was asked if codefendant Peralta had solicited him in

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*The trial of this case preceded *Miranda v. Arizona*, 384 U.S. 436, 16 L.Ed.2d 694, 86 S.Ct. 1602 (1966), and the guarantees as recited by the officers complied with the requirements of *People v. Dorado*, 62 Cal. 2d 338, 42 Cal. Rptr. 169, 398 P.2d 361 (1965).

the men's room. Petitioner replied, "Well, yes. Any time you go in there somebody is always showing you something." [Rep. Tr. pp. 149-150.] When codefendant Peralta was similarly asked if petitioner had solicited him, Peralta replied, "Well, yes. He was playing with hisself [*sic*]." [Rep. Tr. p. 153.] Those statements were freely and voluntarily made. Neither defendant was in the presence of the other at the time he made his own statement to the police. [Rep. Tr. pp. 148, 152.]

ARGUMENT

I

This Petition Does Not Present Any Important Questions of Law

The issues presented in this petition were all raised in the jurisdictional statement filed in connection with this petitioner's attempted appeal in 1969. Without requesting a response from the Attorney General of the State of California, this Court dismissed the 1969 appeal for want of jurisdiction and, treating the appeal papers as a petition for a writ of certiorari, denied certiorari as well. *Shaw v. California*, 395 U.S. 211, 23 L.Ed. 2d 213, 89 S.Ct. 1772 (1969). Respondent submits that a new bottle and two years of aging have not improved the vintage of the wine.

A. The Asserted Lack of Jurisdiction Because of a Defect in the Felony Complaint Filed With the Magistrate Is a Clearly Frivolous Issue

Petitioner contends that the felony complaint upon which the California magistrate conducted the preliminary examination was defective and that this defect deprived the California courts of all further jurisdiction over his person in the criminal proceedings which ensued. (Petn., pp. 10-12.) Respondent submits that petitioner's argument is based upon a misconception of the applicable law.

Petitioner argues that the felony complaint was insufficient to support a warrant of arrest. (Petn., pp. 10-11.) This argument pointedly ignores the fact that no warrant of arrest was issued upon the complaint. *See Shaw v. Pitchess*, 324 F.Supp. at 785. In this case, petitioner was arrested without warrant pursuant to California Penal Code section 836(1), which provides that a peace officer may arrest without warrant when-

ever "he has reasonable cause to believe that the person to be arrested has committed a public offense in his presence." Thereafter petitioner was taken before a magistrate as required by the following language of California Penal Code section 849(a):

> "When an arrest is made without a warrant by a peace officer or private person, the person arrested, if not otherwise released, must, without unnecessary delay, be taken before the nearest or most accessible magistrate in the county in which the offense is triable, and a complaint stating the charge against the arrested person, must be laid before such magistrate."

Under the circumstances of this case, the only functions served by the felony complaint were (1) to give the accused notice of the crime charged against him and (2) to confer jurisdiction upon the magistrate to hold a preliminary examination. *See Shaw v. Pitchess, supra*, 324 F.Supp. at 785, and Cal. Pen. Code §859. The complaint was fully sufficient for these purposes.

In any event, even if there was a defect in the process leading to this petitioner's commitment for trial, a defect at this stage did not deprive the superior court of jurisdiction to try petitioner on the felony charge, did not operate to deny him a fair trial, and did not undermine the judgment of conviction entered in his case. It is the general rule that defects in the arrest or commitment procedures are not grounds for habeas corpus relief unless the accused is deprived of a fair trial as a consequence. *See, e.g., Hernandez v. Schneckloth*, 425 F.2d 89, 91 (9th Cir. 1970); *Abraham v. Wainwright*, 407 F.2d 826, 828 (5th Cir. 1969). *Cf. Stallings v. Splain*, 253 U.S. 339, 343, 64 L.Ed. 940, 40 S.Ct. 537 (1920).

B. California Penal Code Section 288a Is Not Unconstitutional as Applied to This Petitioner's Act of Oral Copulation Performed in a Public Restroom

Petitioner contends that California Penal Code section 288a is unconstitutional because its reach may extend to acts of oral copulation performed by consenting adults in various private settings. (*See* Petn., p. 12.) Unfortunately for this petitioner, the facts of this case do not arise in that context. The sex act in question here was performed in a public restroom, not in the privacy of petitioner's home. What a person knowingly exposes to the public can hardly be the subject of a constitutionally protected privacy interest. *Cf. Katz v. United States,* 389 U.S. 347, 351, 19 L.Ed.2d 576, 88 S.Ct. 507 (1967).

Furthermore, in the exercise of the police power, each state has the right to enact laws to promote public health, safety, morals and welfare. *Lochner v. New York*, 198 U.S. 45, 53, 49 L.Ed. 937, 25 S.Ct. 539 (1905). Penal statutes proscribing illicit sexual contacts constitute a legitimate and proper exercise of that power. *See* concurring opinions of Mr. Justice Goldberg and Mr. Justice Harlan in *Griswold v. Connecticut,* 381 U.S. 479, 498-99, 505, 14 L.Ed.2d 510, 85 S.Ct. 1678 (1965). Unquestionably, it is a valid exercise of the police power to apply the criminal sanction to the type of public conduct in which this petitioner engaged.

C. The Surreptitious Observation of Petitioner's Conduct Did Not Violate His Fourth Amendment Rights

Petitioner contends that he had a reasonable expectation of privacy within the toilet stall when he engaged in the act of oral copulation and that police observation of the act through the false vent violated his Fourth

Amendment rights. (Petn., pp. 15-17.) Respondent submits that this contention is so clearly without merit that it cannot present a substantial question for decision by this Court.

Petitioner engaged in the act of oral copulation in an open toilet stall, *i.e.*, one enclosed only on three sides. Thus, his conduct was not only observable by the police conducting a surveillance through the false vent but also to any patron of the restaurant who had occasion to use the restroom facilities. The holding of the United States Court of Appeals for the Ninth Circuit in *Smayda v. United States,* 352 F.2d 251 (9th Cir. 1965), *cert. denied,* 382 U.S. 981, 15 L.Ed.2d 471, 86 S.Ct. 555 (1966), appears to be dispositive of the issue presented here. Under circumstances similar to those presented in this case, the Court of Appeals held that a discreet surveillance of a public restroom did not amount to an "unreasonable search" under the Fourth Amendment. (*Id.* at 254-59.) This holding is consistent with the language employed by this Court in *Katz v. United States, supra,* 389 U.S. at 351: "What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. . . ." One can scarcely entertain a reasonable expectation of privacy when he performs an illicit sex act in an open toilet stall.

D. The Application of the Harmless Error Test to the Admission of Codefendant Peralta's Statement Is Clearly Controlled by Settled Federal Law

Petitioner contends that the California and lower federal courts erred in holding that the admission of codefendant Peralta's statement implicating petitioner was harmless error under *Chapman v. California,* 386

U.S. 18, 24, 17 L.Ed.2d 705, 87 S.Ct. 824 (1967). Respondent submits that this Court's decision in *Harrington v. California,* 395 U.S. 250, 23 L.Ed.2d 284, 89 S.Ct. 1726 (1969), is controlling on this point.

In this case, an extrajudicial statement made by co-defendant Peralta and tending to implicate petitioner was admitted under circumstances amounting to a violation of the rule enunciated in *Bruton v. United States,* 391 U.S. 123, 20 L.Ed.2d 476, 88 S.Ct. 1620 (1968). But, as in the *Harrington* case, the admission of the co-defendant's statement was merely cumulative of other overwhelming evidence pointing to petitioner's guilt. Petitioner himself made an extrajudicial statement which was also admitted into evidence and which was equally incriminatory. *See Harrington v. California, supra,* 395 U.S. at 253-54. The testimony of the surveilling police officer as to petitioner's participation in the proscribed acts was uncontradicted. Petitioner offered no defense whatsoever. Under these circumstances, the lower courts correctly concluded that the *Bruton* error was harmless beyond a reasonable doubt.

II

There Is No Conflict of Decisions

Petitioner argues that this Court should grant certiorari to resolve what he conceives to be a conflict between *Smayda v. United States, supra,* 352 F.2d 251 (9th Cir. 1965), and *Cotner v. Henry,* 394 F.2d 873 (7th Cir.) *cert. denied,* 393 U.S. 847, 21 L.Ed.2d 118, 89 S.Ct. 132 (1968). (*See* Petn., p. 9.) Respondent submits, however, that these decisions are not in conflict but merely announce two different rules governing two separate and distinct factual situations.

As discussed above, the *Smayda* decision holds that there is no violation of Fourth Amendment rights where homosexual activities in a public restroom become the object of a clandestine surveillance. In contrast, *Cotner v. Henry, supra,* held that the Indiana sodomy statute was unconstitutional as applied to a consensual act between husband and wife in the privacy of their own home. The wide divergence of the subject matter involved in these two cases thus occasions no conflict appropriate for resolution by this Court.

Conclusion

For the foregoing reasons, respondent urges that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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